

THE HONORABLE BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOHN DOE #1, an individual; JOHN DOE
#2, an individual; and PROTECT
MARRIAGE WASHINGTON,

Plaintiffs,

v.

SAM REED, in his official capacity as
Secretary of State of Washington and
BRENDA GALARZA, in her official
capacity as Public Records Officer for the
Secretary of State of Washington,

Defendants.

No. C:09-cv-05456 BHS

INTERVENOR WASHINGTON
FAMILIES STANDING TOGETHER'S
MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:
JULY 22, 2011

ORAL ARGUMENT REQUESTED

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PURSUANT TO STIPULATED PROTECTIVE ORDER
(DOCKET NO. 181)**

INTERVENOR WASHINGTON FAMILIES STANDING
TOGETHER'S MOTION FOR SUMMARY
JUDGMENT (NO. C:09-CV-05456 BHS)

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I. INTRODUCTION

[I]t may . . . be a bad idea to keep petition signatures secret. There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. . . . I do not look forward to a society which . . . exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism.

Doe v. Reed, 561 U.S. ___, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring).

Plaintiffs Protect Marriage Washington ("PMW") and John Does #1 and #2, bear a heavy burden. To establish an exception from Washington's Public Records Act ("PRA"), RCW Chap. 42.56, for Referendum 71 ("R-71") petition sheets, Plaintiffs must show those who signed a petition—two years ago for a past election—(1) are a "minor party" and (2) face a "reasonable probability," if petition sheets are disclosed, of severe and widespread harassment the State is unwilling or unable to address. As a matter of law, the record in this case fails that standard.

First, those who signed R-71 petitions are not a "minor party" akin to other groups labeled as such by the U.S. Supreme Court, such as the Socialist Workers Party in the 1970s. Indeed, many who signed the petitions may have simply wished to see the issue placed on the ballot before the voters. The Supreme Court has never recognized such an ad hoc group of voters, who by definition never chose to join a party, much less an identified organization of any kind, as expressing an "associational interest" sufficient to warrant intrusive disruption of a state's otherwise-applicable public disclosure requirements.

The record is even starker with respect to the "reasonable probability" standard. Plaintiffs seek a disclosure exemption for all petition *signers* – not for signature *gatherers*, R-71 spokespeople, or public endorsers of the measure, although they make up the vast majority of those who are put forth as witnesses. Their position on the issue is *already* well-known and disclosing that they also signed the petition adds nothing to the public record. Nor would such disclosure provide support for Plaintiffs' claims regarding petition *signers*. The record before the Court, in short, cannot justify the sweeping relief sought by Plaintiffs.

1 Plaintiffs originally requested a preliminary injunction in the midst of a campaign. Since
 2 then, the Supreme Court has clarified that disclosure is the default rule, not the exception, and
 3 that as-applied exceptions are narrow and to be applied only in unusual circumstances. Plaintiffs'
 4 claims have now been subjected to close scrutiny, on the record and subject to cross-
 5 examination. With that guidance and fully developed record, it is now clear that Plaintiffs' case
 6 does not begin to meet the reasonable probability test laid out by the Court.
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 8
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 11

12 What the record does show is that this was a campaign like any other campaign on a
 13 highly public issue. The R-71 campaign was hotly debated and highly publicized. It addressed
 14 an issue—civil rights for domestic partners—that is among an array of much-debated social
 15 issues in our state that are the subject of intense differences of opinion. Vigorous discourse
 16 accompanies many issues in today's climate, whether taxes, stimulus spending, health care
 17 reform, marijuana, reproductive rights, or even replacing the Alaskan Way viaduct. Indeed,
 18 Plaintiffs' evidence of "harassment" is simply a reflection of the fact that public proponents (and
 19 opponents) of placing R-71 on the ballot experienced the garden-variety push and shove that
 20 occurs in any vigorous political campaign. On this record, no reasonable jury could find for
 21 Plaintiffs, and, accordingly, Intervenor Washington Families Standing Together ("WAFST")
 22 moves for summary judgment dismissing Plaintiffs' claims in their entirety.
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34 **A. Referendum 71**

35 **1. The Measure**

36 R-71 was a ballot measure that sought a vote in an effort to overturn Engrossed Second
 37 Substitute Senate Bill 5688, an enhanced domestic partnership law signed into law in May 2009.
 38 To put the measure before the voters, the sponsor (PMW) needed to submit petitions signed by at
 39 least 120,577 legally registered voters by July 26, 2009. *See* Wash. Const. art. II, § 1(b). In May
 40 2009, PMW filed R-71 and began gathering the necessary signatures. *See Doe*, 130 S. Ct. at
 41 2816. R-71 petition circulators gathered signatures in public places, such as community events,
 42 county fairs, churches, storefronts, and shopping malls. *See, e.g.,* John Doe Decl. #4 ¶ 8 (Dkt.
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1 #53 at 2); John Doe Decl. #5 ¶ 5 (Dkt. #54 at 2); Declaration of William B. Stafford ("Stafford
 2 Decl."), Ex. K, at 223 (Dep. 9:12-22). As a result, the act of signing a petition was
 3 almost invariably never private. All signatures, names, addresses, and email addresses on the
 4 petition sheet were easily viewable not just by the petition circulator and PMW, but by any other
 5 signer or potential signer who reviewed the petition, *see, e.g.*, Stafford Decl., Ex. M, at 317
 6 (Dep. 62:14-17), and petition sheets were sometimes posted or left on a table, *see, e.g., id.*,
 7 Ex. R, at 435 (Dep. at 12:2-12). Plaintiffs do not present *any* evidence that any
 8 individuals refused to sign the petitions out of concern that their identities would become known.

9 R-71 qualified for the ballot, and the voters spoke – approving R-71 by a vote of 53% to
 10 47%. *See* Declaration of Noel Frame ("Frame Decl."), ¶ 15, Ex. B. 951,822 Washingtonians
 11 voted to approve R-71, while 838,842 voted to reject it, *id.*, making Washington the first state in
 12 the nation to vote affirmatively in support of relationship recognition for LGBT individuals.

13 **B. Procedural Posture**

14 PMW commenced this action on July 28, 2009, joined by two "John Doe" plaintiffs.
 15 Plaintiffs objected to the disclosure of R-71 petitions on two grounds: (1) that it was
 16 unconstitutional for the State to disclose *any* referendum or initiative petitions under any
 17 circumstances, Compl., Count I (Dkt. #2); and (2) that disclosure of R-71 petitions was
 18 unconstitutional "because there is a reasonable probability that the signatories of the R-71
 19 petition will be subjected to threats, harassment, and reprisals." Compl., Count II (Dkt. #2).

20 Plaintiffs moved for a preliminary injunction. On a limited record, in the heat of the
 21 campaign, the Court concluded that Plaintiffs were entitled to relief under Count I of the
 22 Complaint and explicitly declined to reach the question whether the alleged threats of harassment
 23 justified exempting the petitions from disclosure under the "reasonable probability" of harm
 24 standard articulated in *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982).
 25 The State appealed, and the Ninth Circuit reversed. *Doe v. Reed*, 586 F.3d 671 (2009). The
 26 Supreme Court accepted review and, by an eight-to-one decision, affirmed the Ninth Circuit.

1 *Doe*, 130 S. Ct. 2811. (Although the Supreme Court did not address Plaintiffs' as-applied
2
3 challenge, it noted that Plaintiffs had provided "scant evidence" and that "what little plaintiffs do
4
5 offer with respect to typical petitions in Washington hurts, not helps.") *Id.* at 2821.

6 7 **C. Discovery**

8 On remand, the parties embarked on discovery. Plaintiffs identified nineteen witnesses,
9
10 including the two John Doe plaintiffs and three additional John Doe declarants. The State and
11
12 intervenors took the depositions of all but one of these witnesses.¹ The State provided its own
13
14 witness list, and also served written discovery, seeking all documents evincing or related to
15
16 harassment of R-71 petition signers. Stafford Decl., Ex. S. Discovery in this matter has now
17
18 closed. *See* Dkt. #128. Thus, the evidence Plaintiffs may rely on to carry their burden in this
19
20 matter consists solely of (1) the testimony of the identified witnesses and (2) the documents
21
22 produced in discovery, nothing more. Whatever else might be said of that record, it falls well
23
24 short of the constitutional mark necessary to establish an as-applied challenge.

25
26 In short, the parties have developed a record laying bare what was not fully developed at
27
28 the time the Court issued its preliminary injunction order—Plaintiffs' evidence of "threats" and
29
30 "harassment" consists of nothing more than uncomfortable conversations between R-71
31
32 proponents and opponents, heated rhetoric exchanged in the midst of a campaign, experiences
33
34 unrelated to R-71, and a handful of incidents in which the police were contacted and addressed
35
36 any issues.² Plaintiffs presented no evidence R-71 petition signers were harassed by government
37
38 agents, or that police refused to provide assistance to supporters of R-71 when requested.

39 40 **1. The Doe Plaintiffs and Doe Declarants**

41 The John Doe plaintiffs and declarants supported R-71 publicly, and testified they (1) did
42
43 not personally have serious concerns if the fact they signed the R-71 petition was disclosed; and
44
45 (2) experienced no real harassment because of their support. This testimony does not help
46
47 Plaintiffs' case.

48
49
50 ¹ Defendants did not depose a minor whose testimony would be redundant with that of another witness.

51 ² WAFST accepts as true facts testified to in the witness depositions for purposes of this motion.

1 a. **John Doe #1,**

2 participated in a rally to gather signatures for R-71, at which he
3
4 announced his opposition to same-sex marriage in a videotaped interview that is posted on the
5
6 internet. Stafford Decl., Ex. A, at 16-17 (Dep. 22:19-23:19). He signed the R-71
7
8 petition in public. *Id.* at 11-15 (Dep. 8:14-12:22). When asked to participate in the
9
10 lawsuit, said he "was happy to serve as a name . . . on the docket," and "was happy to
11
12 have [his] name associated with the [R-71] campaign," *id.* at 18-19 (P. Dep. 27:5-7, 28:16-
13
14 17). He also said that he would not "be hesitant to testify in federal court" if asked. *Id.*, at 21
15
16 (Dep. 32:14-15). did not experience harassment or threats as a result of his
17
18 public endorsement of R-71, and is aware of no threats to him if he were to testify publicly in
19
20 this matter. *Id.*, at 20, 22-24 (Dep. 31:3-17, 45:3-21, 47:17-48:7).

21
22 b. **John Doe #2,**

23 gathered petition signatures in highly public locations on multiple
24
25 occasions, *id.*, Ex. B, at 29-30 (Dep. 10:19-11:17), and waved an R-71 sign in a high
26
27 traffic area with approximately seventy other people, *id.* at 31-32 (Dep. 14:17-15:10).
28
29 He stated that he has never tried to keep his support of R-71 a secret, and that he is comfortable
30
31 with letting people know he signed the petition and is proceeding as a John Doe not "because of
32
33 [his] name, but because of other people." *Id.* at 33, 39 (Dep. 19:8-13, 38:6-17). He does
34
35 have "some" concern about testifying publicly, but the only negative experiences he had during
36
37 the R-71 campaign were: (1) receiving an angry text message from his own brother; (2) being
38
39 "moonied" (by an unidentified teenager in a passing car); and (3) being "flipped off" by people in
40
41 passing cars. *Id.* at 33-38 (Dep. 19:17-20:4, 22:23-23:6, 25:7-23, 29:9-23).

42
43
44 c. **John Doe #3,**

45 publicly and repeatedly endorsed the R-71 campaign. *Id.*, Ex. C, at
46
47 46-48 (Dep. 10:10-18, 12:19-20, 13:1-24). He signed the petition himself, likely at his
48
49 church, and publicly encouraged others to do so as well. *Id.* at 45-46 (Dep. 9:23-10:21).
50
51

During his deposition, he stated that he would have no problem testifying publicly in court, and that there was no reason why his involvement with R-71 needed to be kept a secret. *Id.* at 44 (Dep. 8:13-24). He did claim to have experienced "harassment" when a transgender woman called and, in a "reserved" tone, suggested she might bring some people "to picket the church or to attend a morning service," though she "assured" him they would "conduct themselves in a way appropriate to a public worship service." *Id.* at 49-50 (Dep. 20:1-21:25). stated that she "was not inappropriate in the way she expressed herself." *Id.* at 53 (Dep. 37:17-20). He assumes she obtained his name by referencing PMW's R-71 website, where he was listed as a supporter. *Id.* at 52 (Dep. 28:6-11).

received no other calls regarding R-71, received no mail regarding R-71, did not feel he was harassed or threatened in any other way prior to the R-71 election, and has not received any threats or harassment after the election. *Id.* at 51-52 (Dep. 27:10-28:5).

d. John Doe #4,

had "a very, very public position in the referendum," including testifying in front of the state legislature, gathering petition signatures in front of "big box" stores, and participating in television interviews. *Id.*, Ex. D, at 58-61, 68, 70-71 (Dep. 7:13-8:18, 16:1-17:16, 25:17-23, 30:24-31:10). He does not feel secretive about his opinions regarding R-71 or his position in this lawsuit. *Id.* at 68 (Dep. 25:12-26:5).

He alleged four incidents of "harassment" during the R-71 campaign: (1) when a lesbian couple approached him while he was gathering signatures and said "We have feelings too"; (2) when a transgender person asked him "Why are you getting these signatures?" and then suggested that she was "going to bring a bunch of [her] friends . . . to [his] church on this Sunday and . . . pack [the] church"; (3) when a young woman took a picture of him and his wife gathering signatures; and (4) when someone asked the manager of a store where he was gathering signatures to ask him to leave, a request the manager declined. *Id.* at 61-67 (Dep. 17:23-23:10).

1 e. **John Doe #5,**

2 was very public in her support of R-71, spending at least ten days gathering
3
4 more than 1,000 petition signatures in front of stores, testifying at a state legislative hearing,
5
6 publicly endorsing R-71, and voicing her opinions on radio stations and in newspaper interviews.
7
8 *Id.*, Ex. E, at 76-80, 82-85 (Dep. 8:16-10:4, 12:15-13:25, 17:3-18:23, 45:8-46:13).
9
10 She would "feel comfortable telling someone publicly that [she has] been involved in this
11
12 lawsuit," and that she supported R-71. *Id.* at 80-81 (Dep. 13:22-14:7).
13
14 reported the same "harassing" incidents as , and one additional incident in which she
15
16 received phone calls from a transgender person who asked why she was collecting signatures for
17
18 R-71 and suggested she was going to bring a group of her homosexual and transgender friends to
19
20 a service at church. *Id.* at 85-91 (Dep. 46:24-52:24).
21

22 2. **Plaintiffs' Other Witnesses**

23 Plaintiffs have identified fourteen other witnesses. Presumably, Plaintiffs identified the
24
25 individuals who, in Plaintiffs' estimation, could present the most vivid and compelling evidence
26
27 that it is reasonably probable that anyone who merely signed the R71 petition can reasonably
28
29 anticipate being subjected to severe harassment that will go unaddressed by the State. In any
30
31 event, these are the individuals on whose testimony Plaintiffs must rely to make their case.
32
33

34 a.

35 publicly expressed his opinion regarding R-71. He held an R-71
36
37 campaign sign at a Spokane intersection on two occasions. *Id.*, Ex. F, at 96 (Dep.
38
39 16:12-23). On five or six occasions, he solicited R-71 petition signatures. *Id.* at 97-99
40
41 (Dep. 23:12-25:6). And, he posted an R-71 sign in his yard. *Id.* at 99 (
42
43 Dep. 25:7-8). He received no physical threats or harassment as a result of his R-71 activities. *Id.*
44
45 at 100 (Dep. 28:5-14). In the summer of 2010, two or three Post-It notes containing
46
47 vulgar language were placed on his vehicle, but he does not know whether they were related to
48
49 his R-71 support. *Id.* at 100-102 (Dep. 28:21-30:24).
50
51

b.

Id., Ex. G, at 107

(Dep. 6:1-6). He has not sought to hide that he signed the R-71 petition, and publicly supported R-71, including at rallies and other events. *Id.* at 137-43 (Dep. 56:9-62:12). He is "in the public's eye all the time" and when asked whether he knew he may be required to publicly testify, he replied: "That's why I agreed to do it." *Id.* at 108-09, 117-18

(Dep. 6:11-17). He has for many years taken a public stance against gay rights; for example, he organized and spoke at

Id. at 110-14 (Dep. 10:10-

11:21, 20:25-21:2). He has been covered in the media extensively. *Id.* at 115-16 (Dep. 13:25-17:8). The last time he "Googled" his name, there were approximately 300,000 hits. *Id.* at 154 (Dep. 18:15-19:2). He has continued to speak out, after the R-71 election, on issues involving homosexuality. *Id.* at 154 (Dep. 76:3-12).

Over the years, office has received calls taking issue with his views on gay rights, including threatening phone calls, though he cannot point to any calls or threats received specific to R-71. *Id.* at 130-31, 134, 144-45, 147, 150, 153-54 (Dep. 38:22-39:2, 46:4-22, 63:7-64:10, 66:3-13, 71:10-21, 75:22-76:19). He is not aware of death threats made to him because of his position on R-71. *Id.* at 145-47 (Dep. 64:24-66:2). He has never been physically attacked at rallies or protests. *Id.* at 135 (Dep. 48:3-8). To his knowledge, no members of have been attacked or harassed because they signed the R-71 petition. *Id.* at 149 (Dep. 69:5-10).

While not connected to R-71, has spoken at rallies at which the police were present and took action to maintain the peace, and he has contacted the police on numerous occasions and been "pleased" with their responsiveness. *Id.* at 119-30, 132-36, 148-49, 151-52 (Dep. 26:9-30:7, 32:12-38:19, 44:5-46:3, 48:12-49:16, 68:6-69:4, 73:16-74:4).

c.

Id., Ex. H, at 159-61 (Dep. 8:24-9:7, 14:4-11). He hosted and attended meetings held in support of R-71, attended by dozens of people, and had an R-71 sign in front of his house. *Id.* at 174-83, 185-86 (Dep. 56:6-65:15, 75:16-76:11). He signed the petition in his church. *Id.* at 184 (Dep. 68:9-12).

He expressed fear of being a witness, but said that would be true for any lawsuit because of bad experiences in the Soviet era in his native Ukraine. *Id.* at 162-65 (Dep. 22:11-25:4). During the R-71 campaign, a woman took photographs of his house on one occasion (telling him it was for a school project) and he felt he was being watched on a few occasions. *Id.* at 167-71 (Dep. 42:11-43:2, 48:10-50:22). He thinks his mail was stolen but is not sure and does not know if it was because of R-71. *Id.* at 172-73 (Dep. 52:19-53:3). He never filed a police report about these events. *Id.* at 166 (Dep. 38:11-22).

d.

was publicly involved in gathering signatures, waving R-71 signs at busy intersections, and engaging in campaign strategy meetings two or three times every week for three months. *Id.*, Ex. I, at 205-06 (Dep. 33:23-34:5). After R-71 qualified for the ballot, he continued publicly campaigning twice a week. *Id.* at 206 (Dep. 34:19-24).

had an R-71 sign posted in the yard at his home and put an R-71 bumper sticker on his car. *Id.* at 192, 205 (Dep. 14:8-9, 33:21-22). has no concerns with giving public testimony regarding his involvement with R-71. *Id.* at 191 (D. Dep. 9:14-22).

describes three incidents that he characterized as harassment. One night after a sign holding rally a young man directed expletives at and pushed him. *Id.* at 193-96 (Dep. 18:15-21:16). did not notify a police officer who was within his sight. *Id.* at 196-97 (Dep. 21:21-22:8). At another rally and others were approached by three young men wearing only thong underwear, who mooned the group and threw garbage at them from the window of their van; nobody was physically hurt. *Id.* at 198-201 (Dep.

23:18-24:5, 25:5-11, 29:8-9). Finally, when collecting R-71 signatures was approached by a woman who said "we'll do everything to stop what you're doing" and a man who said "we'll have your kids." *Id.* at 202-04 (Dep. 30:20-32:1). was neither physically threatened nor concerned for his safety, and did not notify the police of the incident. *Id.* at 204-05 (Dep. 32:2-12, 33:8-20).

e.

spoke to many people about R-71. *Id.*, Ex. J, at 213 (Dep. 8:6-10). Given his public support for R-71, "of course people knew my view about this matter." *Id.* at 213 (Dep. 8:6-10). He has no objection to testifying publicly about his support of R-71. *Id.* at 211-12 (Dep. 6:21-7:1). He did not experience any harassment directed towards him personally as a result of his support for R-71. *Id.* at 214-15 (Dep. 11:25-12:16). He reported that notes were left near his church stating that "you're worse than the fascists," "get out of here" and "your children . . . will be homosexuals." *Id.* at 214-15 (Dep. 11:25-12:16). He did not feel threatened by the notes and did not call the police to report the notes. *Id.* at 216-17 (Dep. 15:15-16:16).

f.

was an active supporter of R-71. He gathered petition signatures in public locations on many occasions, waved R-71 signs in a high traffic location, and placed an R-71 bumper sticker on his car and an R-71 sign in his yard. *Id.*, Ex. K, at 222-26 (Dep. 8:25-10:25, 13:17-14:14). He was interviewed by a reporter who published a story listing him as an R-71 supporter. *Id.* at 227 (Dep. 20:14-17). He is not concerned about testifying in court. *Id.* at 242-43 (Dep. 39:25-40:4).

- On a few occasions, felt he was harassed for his support of R-71. While he was holding an R-71 sign on a bridge, some passing motorists shouted insults or made offensive gestures, but he did not feel physically threatened. *Id.* at 228-31, 244 (Dep. 21:12-24:20, 47:20-25). While gathering signatures on two occasions, two individuals shouted

1 profanity at him, but he did not feel threatened and he did not call the police. *Id.* at 232-37
 2
 3 (Dep. 25:22-30:23). name appeared on an apparently pro-gay rights
 4 website, but this did not concern him about his personal safety, and he did not call the police. *Id.*
 5
 6 at 238-40 (Dep. 31:1-5, 33:7-12, 34:6-11). He has not experienced any harassment or
 7
 8 threats since the R-71 vote. *Id.* at 241, 245-46 (Dep. 35:7-10; 51:22-52:4).
 9

10
 11 g.

12
 13
 14 . *Id.*, Ex. L, at 251-52, 286-87 (Dep. 9:25-10:2;
 15
 16 91:16-18, 94:6-8). frequently expressed his support for R-71 via posts on websites,
 17
 18 speeches at public hearings and rallies, and interviews and articles published by prominent news
 19
 20 organizations. *Id.* at 253-56, 260-67, 284-85 (Dep. 19:6-20:8, 20:11-22:14, 36:6-39:10,
 21
 22 40:19-25, 41:22-43:3, 83:2-18, 85:10-21). authorized
 23

24 to spend funds on R-71 activities, all publicly identified on the Public Disclosure
 25
 26 Commission's ("PDC") website. *Id.* at 257-59 (Dep. 29:8-31:3). He is willing to testify
 27
 28 in court. *Id.* at 224 (Dep. 10:14-18).
 29

30 states he received death threats via a blogger's website. When asked to explain
 31
 32 how the website advocates violence against him, admitted the website did not advocate
 33
 34 violence except in self-defense to a violent physical attack. *Id.* at 268-74 (Dep. 45:10-
 35
 36 51:2). He did not report the website to the police. *Id.* at 276-78 (Dep. 60:22-25, 63:18-
 37
 38 20, 64:9-11). He has not suffered a physical attack or received other threats related to his
 39
 40 support of R-71. *Id.* at 275-76, 279-83 (Dep. 59:24-60:7, 65:7-9, 68:1-71:14, 71:17-21).
 41

42 h.

43
 44 At the time of the R-71 campaign, was a candidate
 45
 46 working to make publicly known her name and stance on issues, including R-71. gathered
 47
 48 signatures for R-71 and has made public her support for R-71. *Id.*, Ex. M, at 292, 296-98, 317,
 49
 50
 51

319 (Dep. 7:11-18, 11:19-13:12, 62:6-13, 89:11-13). is not concerned about publicly
testifying in court. *Id.* at 299 (Dep. 17:11-16).

, the Everett Herald published a long, front-page article about
candidacy,

and mentioning that had signed the R-71 petition. *Id.* at 293-96 (Dep. 8:25-9:17, 10:25-11:18). The article contained contact information for including a
cellular phone number at which she has not received any calls regarding R-71. *Id.* at 304-05, 320
(Dep. 23:12-24:1, 96:1-16). That evening, an anonymous individual called her family's
unlisted home phone and, speaking to son, asked for , said "I will kill you and your
family," and then hung up. *Id.* at 299-300, 303 (Dep. 17:19-18:18, 21:9-25). The caller
did not mention R-71. *Id.*, at 303 (Dep. 21:9-25). called the police, who responded
within five minutes, took her statement, reassured her, advised her that the police would perform
extra patrols of her house, and followed up with her the next day about a means by which she
might be able to trace further calls. *Id.* at 301-03, 306-07 (Dep. 19:13-21:2, 30:10-31:24).

Other than that incident, does not report any threats or harassment she believes are
related to her support for R-71. *Id.* at 308-12, 318 (Dep. 32:10-20, 37:16-20, 38:17-23,
40:21-41:11, 64:15-19). Months after the election, two people threw applesauce on her son from
a car, but she is unsure why they did so. *Id.* at 312-16 (Dep. 41:22-43:2, 49:22-50:2).

i.

Her picture and statement of support are
printed on the back of each R-71 petition sheet. Dkt. #27, Ex. A at 12. She endorsed R-71 on the
PMW and Faith and Freedom Network websites. Stafford Decl., Ex. N, at 326-30 (Dep.
15:6-17:4, 24:17-25:22). She wrote a fundraising message that appeared on the PMW website.
Id. at 329-30 (Dep. 24:17-25:22). She also made six donations to PMW; information
that is available on the PDC's website. She has no concern about testifying publicly in this case
if her testimony does not occur during legislative session. *Id.* at 325 (Dep. 7:4-13).

received several phone calls and two faxes in October 2009 she believes are related to her support of R-71. *Id.* at 331-33, 337-38, 344-46 (Dep. 26:17-28:13, 36:21-37:13, 46:12-48:2). She recalls the caller used vulgar language, but does not recall being told her stance on R-71 had motivated the calls. *Id.* at 334-35 (Dep. 29:8-30:17). She did not feel physically threatened by the calls and faxes, nor did she notify the police. *Id.* at 336, 339-40, 346-49 (Dep. 33:11-21, 41:24-42:3, 93:24-94:12, 105:11-14, 106:4-8). She did not experience anything else she felt was a threat or harassment related to R-71. *Id.* at 340-42 (Dep. 42:22-43:8, 45:10-13).

j.

Id., Ex. O, at 355-56 (Dep. 6:1-13, 7:7-11). He is "personally extremely public." *Id.* at 356 (Dep. 22:14-17). testified against the bill that was a precursor to R-71 in a public hearing in front of about 300 spectators. At this hearing, he provided both his name and address. *Id.* at 354-55 (Dep. 6:7-7:5). He remains listed on the PMW website, spoke with reporters and appeared in internet and print stories about R-71, had more than twenty radio appearances, won a and appeared on TV, participated in public debates, and spoke in front of approximately 2,000 people when R-71 was filed. *Id.* at 356-57, 363-67 (Dep. 22:18-23:15, 35:23-37:15, 38:7-39:20). Although he did not experience physical harassment or violence, the PMW campaign received threatening or hostile emails. *Id.* at 368-69, 377 (Dep. 48:16-49:9, 73:1-2). He felt personally threatened when a Bellingham blogger wrote, "Why can't we go to Arlington and harm his family?" *Id.* at 370, 388-89 (Dep. 53:2-24, 130:15-131:2). contacted the police who, in response, promised to investigate the matter; reported no incidents involving the blogger after this. *Id.* at 371-73, 390-92 (Dep. 56:20-58:2, 140:21-142:6). The only other time felt threatened was when his daughter told him a man was outside photographing his house, though did not see the man and does not know why someone would take such photos. *Id.* at

374-75 (Dep. 59:7-60:25). He did not contact the police about the photographer. *Id.*
at 376 (Dep. 71:10-25).

received phone calls from a transgendered individual that he perceived as
"bothersome." *Id.* at 381-82, 384-87 (Dep. 86:9-87:15, 90:7-91:3, 124:22-125:1).
did not contact the police about this caller. *Id.* at 383, 385 (Dep. 88:18-20,
91:4-12). Since the election, has continued to act in a public role as a
and blogger, and on occasion has received emails or read blog posts calling him such
things as a "rat" or a "homophobic bigot." *Id.* at 378-80 (Dep. 83:17-85:21).

k.

, participated in public events, and was listed by name in
newspaper articles in connection with the campaign. *Id.*, Ex. P, at 397-98, 400-01 (Dep.
5:24-25, 7:3-24, 10:3-15, 11:16-25). He commented online on an article in The Stranger
about R-71 and identified himself *Id.* at 399 (Dep. 8:4-13).
He said people wrote back but "[t]hey never said anything about me – you know, they never said,
you know, I am a jerk for working on the campaign or whatever." *Id.* at 402 (Dep.
13:17-23). was never threatened or harassed in connection with R-71, though he heard
a few voicemails left for which included cursing, references to gay
sex, and statements about alleged hatred of homosexuals. *Id.* at 404-07 (Dep.
15:24-16:25, 21:21-22:6). never saw anyone physically attacked for
their association with R-71. *Id.* at 403-04 (14:21-15:16).

l.

shared his opinion on R-71 in public
debates, on the radio, at a public state legislative hearing, and in a letter to the editor in the
Kitsap Sun. *Id.*, Ex. Q, at 412-17 (Dep. 11:8-12:8, 13:17-21, 14:4-17, 17:25-18:15).
does not mind if others know he signed the petition because "it's so miniscule compared
to the fact that I'm a public spokesman, so it's not really – my signature is hardly the issue." *Id.*

at 418-19 (Dep. 19:1-20:4). He does not believe he would be put at risk if R-71 petitions were released. *Id.* at 419-20 (Dep. 20:25-21:2).

described a single incident of harassment because of his support for R-71. *Id.* at 420-28 (Dep. 21:3-29:3). He was handing out brochures on R-71 on a ferry, and a person he handed the brochure to read it, became upset, said it was "a bunch of shit," wadded up the brochure, and threw it at The man then told that he and his partner "had just as much right to get married as" did and sought to have the other ferry passengers take a vote on the issue. determined the man was "at least temporarily berserk" and so "saw no point in continuing." *Id.* at 422 (Dep. 23:13-20). left the area, and ferry workers prevented the man from following him. experienced nothing else that he considered harassment based on his public support for R-71 before the election, and has not experienced anything threatening post-election. *Id.* at 428-29 (Dep. 29:1-3, 31:4-9).

m.

Id., Ex. R, at 434 (Dep. 5:13-16). She signed R-71 at her church office, knew the petition was public upon request, and did not take any steps to keep her signature private. *Id.* at 440 (Dep. 34:1-10). She was not threatened or harassed as a result of signing the R-71 petition. *Id.* at 436 (Dep. 15:5-12). She is not aware of anyone who refused to sign the petition or put up an R-71 sign out of fear, or was attacked or had property destroyed due to supporting R-71. *Id.* at 441, 444 (Dep. 37:4-6, 56:7-23). The church received about 5-10 phone calls telling the church to "shut up" and that if it did not, it would be "taken down," but nobody followed up or damaged the church. *Id.* at 436-38, 443 (Dep. 15:21-16:13, 24:2-10, 40:9-16). She is not "in any way fearful of being harassed personally regarding R-71." *Id.* at 439, 442 (Dep. 31:11-23; 39:4-6).

3. The Written Discovery

On September 21, 2010, and October 1, 2010, Plaintiffs produced documents in response to Defendant's Request for Production of Documents, which sought documents "relating to any

1 alleged harassment, threat or retaliation relating directly or indirectly to R-71." *Id.*, Ex. S.
 2
 3 Plaintiffs produced 1,542 pages of documents in response, primarily newspaper articles
 4
 5 regarding the Prop. 8 campaign in California and the R-71 campaign in Washington. *Id.* ¶ 22.

6 What was *not* included in this production speaks volumes. At his deposition,
 7
 8 stated that he sent an email solicitation to R-71 petition signers whose email addresses
 9
 10 he retained, asking them to share their experiences of harassment. *Id.*, Ex. O, at 358-63 (
 11
 12 Dep. 30:3-35:8). confirmed any responses would have been provided in
 13
 14 Plaintiffs' production. *Id.* WAFST has reviewed the production. It does not appear to contain
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 16 any emails responding to s solicitation in which a person indicates he or she was
 17
 18 harassed because he or she signed the R-71 petition. *Id.* That is, despite solicitation,
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 20 Plaintiffs have not been able to produce a *single piece* of documentary evidence showing a
 21
 22 person who signed the R-71 petition was harassed simply because he or she signed the petition.
 23

24 This is the sum total of the evidence supporting Plaintiffs' extraordinary "as applied"
 25
 26 challenge to Washington's public disclosure requirements. It is, in a word, insufficient.
 27

28 II. ARGUMENT

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 30 It is beyond dispute that the State's interest "in preserving the integrity of the electoral
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 32 process" by requiring the disclosure of referendum petitions is an important state interest; indeed,
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 34 it is the law of the case. *Doe*, 130 S. Ct. at 2819. The question before this Court is whether
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 36 Plaintiffs have made the showing necessary to exempt those who signed the R-71 petitions under
 37
 38 the "reasonable probability" standard governing their as-applied challenge. In light of the way in
 39
 40 which they rely on a doctrine designed to protect minor parties harassed by government actors
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 42 (or that government actors fail to protect), it is worth reviewing that standard with some care.
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44 A. The Reasonable Probability Standard

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 46 The First Amendment provides a narrow exemption from general disclosure requirements
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 48 to "minor parties" in limited instances. *See id.* at 2821 (noting "'minor parties' may be exempt
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 50 from disclosure requirements" in certain circumstances) (quoting *Buckley v. Valeo*, 424 U.S. 1,
 51

74 (1976)).³ Minor parties are those "with little chance of winning an election," and which "are less likely to have a sound financial base." *Buckley*, 424 U.S. at 70-71. An example is the Socialist Workers Party during the 1980s, "a small political party with approximately sixty members in the State of Ohio," which had "little success at the polls," and whose "expenditures in Ohio . . . averaged about \$15,000 annually." *Brown*, 459 U.S. at 88-99. Another example is the NAACP in 1950s Alabama. *See NAACP v. State of Alabama*, 357 U.S. 449 (1958).

Minor parties seeking disclosure exemptions must establish "a reasonable probability that the compelled disclosure of . . . names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Brown*, 459 U.S. at 93 (internal quotation marks and citation omitted). There is no blanket exemption for minor parties; rather, they must produce evidence of probable harassment. *See Buckley*, 424 U.S. at 74. A minor party must show it will suffer "*serious and widespread* harassment" and that law enforcement is unwilling or unable to take action against threats or harassment. *Doe*, 130 S. Ct. at 2829 (Sotomayor, J., concurring) (emphasis added); *see also id.* at 2831 (Stevens, J. concurring).

Courts carefully review the type and amount of evidence that plaintiffs offer in support of their claims for exemptions. "A subjective fear of reprisal is insufficient to invoke first amendment protection against a disclosure requirement." *Dole v. Local Union 375, Plumbers Int'l Union*, 921 F.2d 969, 973 (9th Cir. 1990). Instead, plaintiffs must put forth "objective and articulable facts, which go beyond broad allegations or subjective fears." *Brock v. Local 375, Plumbers Int'l Union, AFL-CIO*, 860 F.2d 346, 350 n.1 (9th Cir. 1988). Courts reject claims based on unsubstantiated speculation and subjective fears.⁴

³ *See also Brown*, 459 U.S. at 94 (discussing test for "exempting minor parties" from disclosure laws); *Protectmarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1215 (E.D. Cal. 2009) ("[M]inor status is a necessary element of a successful as-applied claim . . .").

⁴ *E.g., Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211, 1221 (6th Cir. 1985); *Sherwin-Williams Co. v. Spitzer*, 2005 WL 2128938, at *5 (N.D.N.Y. Aug. 24, 2005) ("Speculating that the [disclosure] . . . may cause a withdrawal of membership does not bolster their claim of a First Amendment infringement.") (citation omitted); *Richey v. Tyson*, 120 F. Supp. 2d 1298, 1323-24 (S.D. Ala. 2000) (highlighting the distinction between the "reasonable probability" standard and the "subjective fear" articulated in that case).

1 The two seminal "reasonable probability" cases are illustrative. In *Brown*, the Supreme
 2 Court found an Ohio statute requiring reporting of the names and addresses of campaign
 3 contributors and recipients of campaign disbursements could not be constitutionally applied to
 4 the Socialist Workers Party ("SWP") because of the "substantial evidence" proffered in that case,
 5 including "threatening phone calls and hate mail, the burning of SWP literature, the destruction
 6 of SWP members' property, police harassment of a party candidate, and the firing of shots at an
 7 SWP office," in addition to the firing of twenty-two SWP members because of their party
 8 membership, "massive" FBI surveillance and a counterintelligence program "designed to impair
 9 the ability of the SWP . . . to function," 8,000,000 government documents relating to the SWP,
 10 and "numerous instances of recent harassment" of the SWP. 459 U.S. at 98-102.
 11

12 Similarly, in *NAACP*, the Supreme Court upheld an as-applied challenge to a state law
 13 requiring disclosure of the identities of the NAACP's local membership because the NAACP
 14 "made an uncontroverted showing that on past occasions revelation of the identity of its rank-
 15 and-file members ha[d] exposed these members to economic reprisal, loss of employment, threat
 16 of physical coercion, and other manifestations of public hostility." 357 U.S. at 462.
 17

18 In contrast, in *Protectmarriage.com*, the Eastern District of California held that
 19 proponents of a constitutional amendment defining marriage as being between a man and a
 20 woman had a "non-minor status" and that "[t]here is surely no evidence that the seven million
 21 individuals who voted in favor of Proposition 8 can be considered a 'fringe organization' or that
 22 their beliefs would be considered unpopular or unorthodox." 599 F. Supp. 2d at 1215-16.
 23

24 **B. The Application of the Reasonable Probability Standard to This Case**

25 The opinion of the Supreme Court in this case did not address what should happen on
 26 remand. The Court held only that as a general matter the State's decision to make petition
 27 signatures subject to the PRA was not unconstitutional, and that a minor party and its members
 28 "resisting disclosure can prevail under the First Amendment if they can" meet the reasonable
 29 probability standard. *Doe*, 130 S. Ct. at 2820.
 30

Four members of the Court provide further guidance. Through the concurring opinions of Justice Stevens (joined by Justice Breyer) and of Justice Sotomayor (joined by Justices Stevens and Ginsburg), four Justices provide this Court with concrete guidance, expressing their view that Plaintiffs can only prevail on their "as applied" challenge by showing not only that petition signers face serious threats or harassment, but that the government was either the source of those threats or has demonstrated an unwillingness or inability to protect R-71 petition signers from those threats.⁵ Justice Sotomayor wrote, "Case-specific relief may be available . . . in the rare circumstance in which disclosure poses a reasonable probability of serious and widespread harassment *that the State is unwilling or unable to control.*" *Id.* at 2829 (emphasis added). Likewise, Justice Stevens wrote, "For an as-applied challenge to a law such as the PRA to succeed, there would have to be a significant threat of harassment directed at those who sign the petition *that cannot be mitigated by law enforcement measures.*" *Id.* at 2831 (emphasis added).⁶

In short, to survive summary judgment, Plaintiffs bear the burden of adducing sufficient evidence that a reasonable jury could find that (1) R-71 petition signers constitute a minor party and disclosure of R-71 petitions poses (2) a reasonable probability of (3) serious and widespread harassment against R-71 petition signers that (4) the State is unwilling or unable to control. But whatever the precise articulation of the "reasonable probability" standard applied to Plaintiffs' claims, it is plain that Plaintiffs cannot possibly prevail on the record before the Court.

C. As a Matter of Law, Plaintiffs Cannot Meet the Reasonable Probability Standard

1. R-71 Petition Signers Are Not a Minor Party

Plaintiffs' claims fail at the threshold as they plainly cannot demonstrate "minor party" status. There is no record evidence that petition signers constitute a cohesive organization (or

⁵ As Justice Scalia expressed his view that petitions should essentially never be anonymous, *id.* at 2832, there actually are five Justices supporting this view.

⁶ Justice Alito offered his view that "to assure a fair consideration of their claim," those seeking to avoid disclosure should be permitted to "rely on a wide array of evidence." *Id.* at 2823 (internal quotation marks and citation omitted). While instructive from an evidentiary standpoint, this analysis ultimately begs the question of what this "wide array of evidence" must demonstrate, and the remainder of Justice Alito's opinion shows he was more focused on what a party might need to show to avoid disclosure during (or before) a campaign than after the campaign had concluded. *Id.* at 2823-27.

1 "minor party") such that it would be appropriate to recognize associational interests binding
 2 those who signed R-71 petitions. Indeed, there is remarkably little evidence in the record with
 3 respect to the vast majority of those who signed the petition.
 4

5
 6 Plaintiffs' case rests on an effort to conflate R-71 petition signers with the political beliefs
 7 expressed by Plaintiffs. There is no record basis for this sleight of hand and no rational basis to
 8 support it. It is not apparent why a given individual signed an R-71 petition; i.e. whether she
 9 wished to see the domestic partnership law rejected or simply believed the public should have an
 10 opportunity to vote on the issue. *See Doe*, 130 S. Ct. at 2817 (noting that "[i]n most cases, the
 11 individual's signature will express the view that the law subject to the petition should be
 12 overturned" but a signer may be "agnostic as to the merits of the underlying law" and instead be
 13 "express[ing] the political view that the question should be considered 'by the whole electorate.'")
 14 (quoting *Meyer v. Grant*, 486 U.S. 414, 421 (1988)). That is, R-71 petition signers do not
 15 amount to the type of organization for whom the Supreme Court has sustained an as-applied
 16 challenge to a disclosure requirement, such as the NAACP or the SWP.
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18
 19 Even assuming every person who signed a petition did so because she opposed the
 20 domestic partnership law, this collection of voters would not be a "minor" party. Opponents of
 21 same-sex marriage do not hold dissident views. *Protectmarriage.com*, 599 F. Supp. 2d at 1219
 22 (opposition to same-sex marriage is "a historically non-controversial belief"). The very
 23 suggestion is absurd. Nearly 840,000 Washingtonians (47% of those who voted) voted no on R-
 24 71, and R-71 passed in *only 10* of Washington's 39 counties. *See* Frame Decl. Ex. B.⁷
 25

26
 27 Popular groups like those who oppose marriage equality and domestic partnership laws
 28 are not the sorts of minor parties that courts are seeking to protect with the disclosure exemption,
 29 and the more than 137,000 people who signed R-71 in a mere sixty-eight days are a far cry from
 30 the sixty-member Socialist Party involved in *Brown*. If the rule were to the contrary—if no
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⁷ Far from being fringe, Plaintiffs' views are in some respects the law of Washington State. In 1998, Washington adopted the state Defense of Marriage Act ("DOMA"), which amended RCW 26.04.010 to describe marriage as a civil contract that is valid only if "between a male and a female." In 2006, the Washington State Supreme Court upheld the constitutionality of DOMA. *See Andersen v. King Cnty.*, 158 Wn.2d 1 (2006).

1 "minor party" showing were required—vast swathes of the populace would be exempt from
 2 disclosure laws. The Democratic Party and progressive groups could undoubtedly show they are
 3 subjected to the type of rough campaign speech at issue here, *see* Frame Decl. ¶¶ 5-13, and the
 4 Republican Party and conservative organizations could do the same. *See, e.g.*, Dkt. #200, ¶¶ 3-
 5 12. This is why "minor status is a necessary element of a successful as-applied claim."
 6 *Protectmarriage.com*, 599 F. Supp. 2d at 1215. If it were not, the as-applied exception would
 7 swallow the general rule of disclosure. *Id.* at 1216 ("Prior courts surely were aware that
 8 members of major parties might . . . become the target of threats or harassment at the hands of
 9 extremist members of an opposing group [But] the Supreme Court [did not] create[] an
 10 exception . . . for the majority.").

11 Because Plaintiffs have adduced no evidence suggesting R-71 petition signers can be
 12 deemed a minor party, their as-applied challenge necessarily fails.

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2. Plaintiffs Cannot Show a Reasonable Probability that R-71 Petition Signers Will Face Severe and Widespread Harassment if R-71 Petitions Are Released

Even if Plaintiffs qualify as a "minor party" for purposes of the disclosure exemption—which they do not—or even if the minor-party exemption sweeps so broadly as to encompass majority groups—which it does not—Plaintiffs cannot meet the reasonable probability standard.

As noted above, Plaintiffs seek relief for those who *signed* the R-71 petition—not PMW, signature gatherers, or community groups opposing the domestic partnership law. It is here that Plaintiffs' evidence fails most dramatically. The record in this case shows that Plaintiffs' claims are premised on the unpleasanties or simple political opposition that accompany any disputed election, such as public or telephone confrontations with PMW campaign workers and volunteers, "mooning" or obscene gestures directed at signature gatherers or sign wavers, and rude blog posts. *Compare generally* Stafford Decl., Exs. A-R with Frame Decl. ¶¶ 5-13. There are no allegations that any person who merely signed the R-71 petition—without taking a public stand—has been threatened or harassed (even at the low levels of those who were much more prominently involved in the campaign). There are no allegations in the Complaint that *any*

1 citizens refused to sign the R-71 petition for fear of harassment. Plaintiffs' showing fails as a
 2 matter of law for a host of reasons.
 3

4 First, R-71 petition signers residing in most parts of the state were in the *majority*. Frame
 5 Decl. Ex. B. Plaintiffs have not begun to show that such individuals would suffer harassment if
 6 the fact of their signature became publicly available.
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10 Second, the act of signing an R-71 petition is no secret; signatures could be viewed by
 11 signature gatherers, people deciding whether to sign the same petition, PMW campaign staffers,
 12 state election workers, and campaign observers during the signature verification process.
 13 Plaintiffs cannot maintain an as-applied challenge to prevent the disclosure of information that
 14 has never been private in the first instance. *Uphaus v. Wyman*, 360 U.S. 72, 81 (1959) (rejecting
 15 challenge to government effort to obtain list of guests who had attended a summer camp because
 16 the parties "had made public at the inception the association they now wish to keep private").
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24 Third, Plaintiffs cannot show R-71 petition signers face a reasonable probability of severe
 25 harassment if petitions are disclosed *now*. The standard is prospective. *Dole*, 921 F.2d at 972.
 26 Here, there is no ongoing "association" of R-71 petition signers—the election is long since
 27 over—and Plaintiffs, despite having had years to gather evidence, have presented no evidence
 28 that disclosure poses a present day risk of harassment. The record, in fact, is to the contrary.⁸
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34 Next, to the extent Plaintiffs rely on alleged statements and events occurring during the
 35 R-71 campaign, impolitic, argumentative, and even threatening statements are not uncommon in
 36 political campaigns and cannot sustain a reasonable probability showing.⁹ "Uninhibited speech
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See Stafford Decl., Exs. U-Z.

Id., Exs. U-Z.

⁹ The issues cuts both ways. See Frame Decl. ¶¶ 5-13. Those opposing the effort to qualify R-71 for the ballot, including members of WAFST, received angry telephone messages and were the subject of hostile, threatening, and harassing blog postings. See *id.* ¶¶ 10-12; Levinson Decl. in Opp'n to Mot. for TRO, Exs. E-G, filed in *Family PAC v. Reed*, No. 09-5662 (W.D. Wash. Oct. 21, 2009) (Dkt. #26).

INTERVENOR WASHINGTON FAMILIES STANDING
 TOGETHER'S MOTION FOR SUMMARY
 JUDGMENT (NO. C:09-CV-05456 BHS) – 22

71718-0001/LEGAL21210430.1

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1 is the single most important element upon which this nation has thrived." *State ex rel. Pub.*
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 3 *Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wn.2d 618, 624-27 (1998). Heated debate lies
 4 at the core of our democracy and the First Amendment. That debate can be contentious because
 5
 6 "[p]articularly in the . . . political realms, 'the tenets of one man . . . seem the rankest error to his
 7 neighbor.'" *Id.* at 625 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940)). "At times
 8 such speech seems unpalatable, but the value of free debate overcomes the danger of misuse."
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 10 *Id.* (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995)).
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14 Thus, "it is our law and our tradition that more speech, not less, is the governing rule."
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 16 *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 911 (U.S. 2010). The fundamental
 17 principle animating a democratic society is that individuals with differing views will hash out
 18 their differences through public debate; in the legislature, in the public square, or with friends,
 19 families, and neighbors. In short, when citizens are confronted with others "who feel differently
 20 about [public] matters," the way to address those differences is through debate—"to persuade
 21 them that they are wrong." *Texas v. Johnson*, 491 U.S. 397, 419 (1989). The salutary effects of
 22 free speech cannot be felt if we all retreat to the comfort of those we know already agree with us.
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30 While one would wish that those who disagree will always do so civilly, the reality can
 31 be different, and passionate, rude, or even hostile speech has been squarely protected by the
 32 courts, and does not constitute harassment or threats warranting a disclosure exemption. To the
 33 contrary, "harsh criticism, short of unlawful action, is a price our people have traditionally been
 34 willing to pay for self-governance." *Doe*, 130 S. Ct. at 2837 (Scalia, J., concurring). "[R]unning
 35 a democracy takes a certain amount of civic courage," and the "First Amendment . . . [does not]
 36 protect you from criticism or even nasty phone calls when you exercise your political rights
 37 to . . . take part in the legislative process." *Stafford Decl., Ex. T* (Scalia, J.).¹⁰
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 47 ¹⁰ The Supreme Court has recognized that "language of the political arena . . . is often vituperative, abusive,
 48 and inexact." *Watts v. United States*, 394 U.S. 705, 706, 708 (1969) (per curiam) (district court erred in failing to
 49 enter a judgment of acquittal for a man accused of threatening the president by saying, "[i]f they ever make me carry
 50 a rifle, the first man I want to get in my sights is L.B.J." because the statement was "political hyperbole"); cf.
 51 *Cafeteria Emps. Union, Local 302 v. Angelos*, 320 U.S. 293, 295 (1943) (government may not hold a union liable
 for "loose language" that is "part of the conventional give-and-take in our economic and political controversies").

1 R-71 was designed to (based on one's views) strip away the civil rights of a vulnerable
 2 minority or protect the sanctity of traditional marriage. R-71 aroused passions, touched on
 3 fundamental beliefs, and unleashed vigorous speech. Plaintiffs' evidence amounts to nothing
 4 more than a showing that among the millions of Washington residents who campaigned for and
 5 against, debated, and voted on R-71, a handful of people expressed disagreement with a handful
 6 of others using colorful, or even rude and offensive, language and deeds common in today's
 7 political discourse, especially when touching on such charged topics. This evidence, even in
 8 combination, fails to rise to the level of a "reasonable probability . . . [of] threats, harassment, or
 9 reprisals."¹¹ It is difficult to see where the proverbial slippery slope would end for all other
 10 campaigns if the rhetoric of this campaign were deemed sufficient to vitiate Washington's PRA.
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21 Plaintiffs' claim suffers from one final fatal deficiency. There is no evidence the State is
 22 unwilling or unable to respond to complaints of threats or harassments. To the contrary, the
 23 evidence before the Court is that the State is both willing and able to control any perceived
 24 threats or harassments against R-71 supporters brought to its attention. In the few instances in
 25 which Plaintiffs' witnesses contacted police, their concerns were addressed promptly. Thus, law
 26 enforcement measures can mitigate any threat of harassment, and that fact alone dooms
 27 Plaintiffs' claim. In short, this is not a situation like the NAACP faced in the South in the 1950s.
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36 III. CONCLUSION

37 On this record, Plaintiffs' claims fail: (a) R-71 signatories do not constitute a minor party
 38 in need of special protection apart from State law enforcement, and (b) Plaintiffs have not put
 39 forth substantial, non-speculative evidence of anything more than heated political rhetoric.
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42 For the reasons stated above, WAFST respectfully submits that this Court should grant
 43 WAFST's motion for summary judgment.
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¹¹ See, e.g., *Protectmarriage.com*, 599 F. Supp. 2d at 1216-20 (no reasonable probability of harassment despite allegations of vandalism and threats made against those who supported Proposition 8); see also *Dole*, 921 F.2d at 972 (same, where minor party showed a decrease in contributions contemporaneous with the subpoena creating a risk of disclosure, but provided no objective evidence the decrease occurred because of the subpoena).

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2 DATED: June 29, 2011

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INTERVENOR WASHINGTON FAMILIES STANDING
TOGETHER'S MOTION FOR SUMMARY
JUDGMENT (NO. C:09-CV-05456 BHS) – 25

71718-0001/LEGAL21210430.1

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CERTIFICATE OF SERVICE

I certify that on June 29, 2011, I electronically filed the foregoing INTERVENOR WASHINGTON FAMILIES STANDING TOGETHER'S MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following attorneys of record.

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1 I certify under penalty of perjury that the foregoing is true and correct.

2
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CERTIFICATE OF SERVICE (NO. C:09-CV-
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